ARTICLES

SCHENGEN AND EUROPEAN BORDERS
edited by Iris Goldner Lang

SCHENGEN PURGATORY OR THE WINDING ROAD TO FREE TRAVEL

HENRIET BAAS* AND JORRIT RIJPMA**

ABSTRACT: This *Article* looks at the practical and legal implications of the Schengen "waiting room". It examines the rules that apply to the verification of readiness in preparation of a Council decision on full accession and the extent to which the rules of the Schengen acquis apply to Schengen Candidate Countries prior to the lifting of internal border controls. It pays particular attention to the legal regime that applies at the borders between "old" and "new" Member States, more specifically Schengen members and Schengen Candidate Countries, and the borders between the Schengen Candidate Countries and third countries. It is argued that the prolonged exclusion from the Schengen area has resulted in a de facto duplication of the EU's external border, accompanied with an incremental, near full application of the Schengen acquis, short of lifting internal border controls. As a result, for already well over fifteen years, Romania and Bulgaria have been part of the accompanying measures that should allow for free travel, yet its nationals have not been able to enjoy the benefits of their EU citizenship in full.

KEYWORDS: Schengen – accession – EU law – external border – border controls – free movement.

* PhD Researcher, European University Institute, henriet.baas@eui.eu.
** Professor of European Law, University of Leiden, j.j.rijpma@law.leidenuniv.nl.

Jorrit Rijpma is currently working as a legal and policy officer at the European Commission. The opinions expressed are those of the Authors only and should not be considered as representative of the European Commission's official position. The Authors would like to thank Fabian Lutz (European Commission) and Cristian Negoescu (Frontex) for their insights when preparing this *Article*, as well as the valuable comments of the anonymous reviewer. The usual disclaimer applies.

ISSN 2499-8249
doi: 10.15166/2499-8249/753

I. Introduction

The 8th of December 2022 proved to be a festive day for Croatia. On that day the Justice and Home Affairs (JHA) Council agreed to the lifting of controls at the internal borders with the EU's youngest Member State, allowing it to join the borderless Schengen area as of 1 January 2023.[1] For Bulgaria and Romania however, there was renewed disappointment, as these countries, members of the EU since 2007, were once again refused the right to apply the Schengen *acquis* in full, remaining outside Europe's free travel area, despite of repeated calls by the European Commission and the European Parliament to the contrary.

Much like a new Member State does not immediately join the single currency upon accession, it also does not lift controls at its internal border. Whilst candidate countries do not have the possibility to negotiate an opt-out from the Schengen *acquis*, new Member States only apply the Schengen rules in part. Their full participation, including the lifting of internal border controls, is subject to a unanimous Council vote, based upon the fulfilment of a set of technical requirements related to their ability to effectively implement the EU's external borders and visa *acquis*. We will refer to the fact that the Schengen *acquis* becomes binding upon the new Member State upon accession, but requires a Council decision to become fully applicable as the two-step accession to Schengen.[2]

Given the unanimity requirement, any Member State has been able to block full accession for reasons unrelated to the Schengen *acquis* itself. Bulgaria and Romania, despite being declared "ready" over a decade ago, have remained outside based on concerns over the rule of law, organised crime and corruption.[3] More recently, their continued exclusion has been motivated by a need to prevent so-called secondary movements of asylum seekers and irregular migration from those countries.[4] Serious allegations of fundamental rights violations at the borders of Romania and Bulgaria, but also Croatia, have also raised questions as to their ability to manage the external borders in line with EU standards.[5]

[1] Council Decision (EU) 2451/2022 of 8 December 2022 on the full application of the provisions of the Schengen acquis in the Republic of Croatia.

[2] One could also argue that it is in fact a three-steps accession, as the second step, involves two separate steps, namely the acknowledgement of fulfilment of all technical criteria and, second, a unanimous Council vote.

[3] V Pop, 'Netherlands, Finland oppose Schengen Enlargement' (22 September 2011) EUobserver euobserver.com; C Bolsover, 'No on Schengen' (21 December 2010) DW www.dw.com.

[4] In December 2022, the Netherlands opposed the accession of Bulgaria citing corruption and the rule of law, but also casting doubt on Bulgaria's capacity to effectively control the external border. Austria opposed the entry of both Romania and Bulgaria, citing the arrival of asylum seekers through the Western Balkans as main reason: J Liboreiro and V Genovese, 'Austria Blocks Schengen Accession of Romania and Bulgaria, while Croatia Gets Green Light' (9 December 2022) Euronews www.euronews.com.

[5] These questions have been primarily raised by NGOs, national parliamentarians, and Members of the European Parliament. The Dutch House of Representatives passed motions calling upon the Dutch government to oppose the lifting of internal border controls altogether, citing human rights violations at the external borders in relation to Croatia, and concerns relating to corruption, organized crime, and the rule of law in

It appears that the continued exclusion of Bulgaria and Romania under the Schengen accession procedure has been used in addition to the post-accession monitoring framework, the Cooperation and Verification Mechanism (CVM), to keep the pressure on for reforms in those Member States.[6]

In this *Article*, we will look at the practical and legal implications of the Schengen "waiting room". We will examine the rules that apply to the verification of readiness in preparation of a Council decision on full accession and the extent to which the rules of the Schengen *acquis* apply to Schengen Candidate Countries prior to the lifting of internal border controls. We will pay particular attention to the legal regime that applies at the borders between "old" and "new" Member States, more specifically Schengen members and Schengen Candidate Countries, and the borders between the Schengen Candidate Countries and third countries.

We argue that the prolonged exclusion from the Schengen area has resulted in a *de facto* duplication of the EU's external border, accompanied with an incremental, near full application of the Schengen *acquis*, short of lifting internal border controls. As a result, for already well over fifteen years, Romania and Bulgaria have been part of the accompanying measures that should allow for free travel, yet its nationals have not been able to enjoy the benefits of their EU citizenship in full.

We conclude that in order to prevent new Member States from remaining stuck in purgatory forever, future accession agreements should stipulate clear and binding commitments on both sides, which go beyond compliance with mere technical requirements, and provide for a proper transitional regime that lays down a clear legal framework governing the situation at the borders of Schengen Candidates with both third countries and those with existing Schengen members.

II. The two-step accession to Schengen

II.1. Schengen accession under primary law

Already under the Schengen Implementing Convention (CISA), the Declaration on art. 139 in the Final Act of the Convention was interpreted so that the bringing into force of the Convention was subject to a unanimous decision of the Executive Committee Decision,

relation to Bulgaria and Romania: Tweede Kamer, *Motie Van Wijngaarden on further Investigation into Border Control by Romania and Bulgaria* www.tweedekamer.nl and *Motie Ceder on Not Agreeing to Croatia's Accession to the Schengen Area unless Respect for Fundamental Human Rights is Ensured* www.tweedekamer.nl. See also Danish Refugee Council, *EU admits Croatia to Schengen Without Regard to Abuses at the Border* pro.drc.ngo.

[6] Commission Decision 2006/928/EC of 13 December 2006 on establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption; Commission Decision 2006/929/EC of 13 December 2006 on establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime.

which had to be adopted "as soon as the preconditions", namely compliance with the flanking or compensatory measures in the field of borders, visa, information exchange and police cooperation.[7] This also included the rules on responsibility for asylum, which were later included in the Dublin Convention and as such ceased to form part of the Schengen *acquis*.[8]

For the EU enlargements of 2004, 2007 and 2013, the two-step accession model was laid down in the Acts of Accession.[9] The text has been *mutatis mutandis* the same, stating that the Schengen *acquis* and "the acts building upon it or otherwise related to it, listed in Annex II, as well as any further such acts and the measures building upon that acquis" bind the new Member States from the moment of accession, but provisions related directly to the lifting of controls at the internal borders shall not apply until the adoption of "a Council decision to that effect after verification in accordance with the applicable Schengen evaluation procedures that the necessary conditions for the application of all parts of the acquis concerned have been met in that new Member State and after consulting the European Parliament".[10]

In relation to Croatia, art. 4(3) of the Act of Accession of 2011 added that the Council would have to "take into account a Commission report confirming that Croatia continues to fulfil the commitments undertaken in its accession negotiations that are relevant for the Schengen acquis".

Like Romania and Bulgaria under the CVM, Croatia was made subject to post-accession monitoring, however, based directly on art. 36 of the Act of Accession. The specific commitments made by Croatia in relation to the judiciary and fundamental rights were listed in Annex VII, of which the independence and efficiency of the judiciary, combatting corruption and improving the protection of fundamental rights would be particularly relevant for Schengen. As such, under the Act of Accession of 2011, a broader set of considerations relating to respect for the rule of law and fundamental rights should inform the Council's decision on the full application of the Schengen *acquis*. In practice, Member States have explicitly referred to the CVM reporting on Bulgaria and Romania to justify

[7] Decision of the Executive Committee of 14 December 1993 concerning the declarations by the Ministers and State Secretaries, SCH/Com-ex (93)10.

[8] Convention implementing the Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic of 14 June 1985 on the gradual abolition of checks at their common borders, ch. 7; Convention 97/C 254/01 between Member States of 15 March 1990 determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (hereinafter: Dublin Convention).

[9] Act of 23 September 2003 concerning the conditions of accession of Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia of 2003 (hereinafter: Act of Accession (2003)); Act of 21 June 2005 concerning the conditions of accession of Bulgaria and Romania, (hereinafter: Act of Accession (2005)); Act of 2011 concerning the conditions of accession of Croatia (hereinafter: Act of Accession (2011)).

[10] Art. 3(2) of the Act of Accession (2003) cit.; art. 4(2) of the Act of Accession (2005) cit.; art. 4(2) of the Act of Accession (2011) cit.

their opposition to full accession of Bulgaria and Romania, although there is no legal basis for doing so in their respective Acts of Accession.[11]

In 2011 the Council suggested that air and sea borders with Romania and Bulgaria could be lifted first, followed by the abolition of controls at internal land borders at a later stage.[12] It has also been suggested, on occasion, that accession of the two countries would not necessarily have to take place at the same time if agreement could only be reached in relation to one. Whilst legally this should be feasible, it would lead to practical problems at the common border between the two Member States, which was never intended to form an external border.

The Acts of Accession do not require a Commission proposal for the Council Decision. The European Parliament does only have to be consulted. Notwithstanding, the European Parliament has on numerous occasions called for the full application of the Schengen *acquis* in the Schengen Candidate Countries that were found to have complied with the necessary conditions, as has the European Commission.[13]

II.2. Schengen accession under secondary law

Evaluations on the preparedness for full application have taken place within the framework of the so-called Schengen evaluations. Prior to the Treaty of Amsterdam, these evaluations were carried out by the Schengen Standing Committee and decided upon by the Schengen Executive Committee.[14] In Amsterdam, the Schengen *acquis* was integrated into the EU legal order and the Council substituted the Schengen Executive Committee.[15] The Standing Committee was substituted by a Council Working Party, the Schengen

[11] B Neagu, 'Dutch not against Romania Joining Schengen if all Conditions Met' (13 October 2022) EURACTIV www.euractiv.com. The Commission issued its last CVM Report for Bulgaria in October 2019: European Commission, *Commission reports on progress in Bulgaria under the Cooperation and Verification Mechanism* ec.europa.eu and for Romania in November 2022: European Commission, *Commission reports on progress in Romania under the Cooperation and Verification Mechanism* ec.europa.eu.

[12] Justice and Home Affairs, Press Release of 13 and 14 December 2011, 18498/11. In practice there is often a distinction between the lifting of controls at the air borders and at other borders for reasons related to the need for this to coincide with the dates of the International Air Transport Association (IATA) summer/wintertime schedule.

[13] See *i.a*. Resolution 2013/C 710 E/04 of the European Parliament of 13 October 2011 on the accession of Bulgaria and Romania to Schengen; Resolution 2018/2092(INI) of the European Parliament of 11 December 2018 on the full application of the provisions of the Schengen acquis in Bulgaria and Romania: abolition of checks at internal land, sea and air borders; Resolution 2022/2852(RSP) of the European Parliament of 18 October 2022 on the accession of Romania and Bulgaria to the Schengen area; Communication COM(2022) 636 final from the Commission of 16 November 2022 "Making Schengen stronger with the full participation of Bulgaria, Romania and Croatia in the area without internal border controls".

[14] Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, SCH/Com-ex (98).

[15] Protocol n. 19 on the Schengen acquis integrated into the Framework of the European Union [2012] art. 2.

Evaluation Working Party (Sch-eval), but the rules and procedures remained the same, combining the use of questionnaires with on-site visits by Schengen evaluators, mostly Member State experts.[16]

In 2013, following the call for stricter supervision and compliance with the Schengen rules,[17] the Council adopted an amended evaluation regime, the so-called Schengen Evaluation and Monitoring Mechanism (SEMM), which gave the European Commission a central role in the evaluation process and also provided for input from the European Border and Coast Guard Agency (Frontex).[18] Art. 4(1) of the Regulation defined the scope of the evaluations broadly, covering "all aspects of the Schengen acquis, including the effective and efficient application by the Member States of accompanying measures in the areas of external borders, visa policy, the Schengen Information System (SIS), data protection, police cooperation, judicial cooperation in criminal matters, as well as the absence of border control at internal borders" and also taking into account the functioning of the authorities responsible for the application of these rules.

The mechanism was amended again in 2022 as part of the Schengen Strategy, which aimed to restore free travel in Europe after the refugee policy crisis, and in response to shortcomings that were identified in evaluations of the 2013 instrument.[19] The main weaknesses were the duration of the process, with slow follow-up action to remedy shortcomings, and a lack of attention for the respect for fundamental rights. Therefore, the new regulation provides for tighter deadlines, an across-the-board evaluation of fundamental rights compliance, and a stronger involvement of the Council in more politically sensitive cases, such as a finding of serious deficiencies and first-time evaluations.[20] It also, for the first time, lays down specific rules for so-called "first-time evaluations" in art.

[16] S Ulrich, M Nøkleberg and HOI Gundus, *Schengen Evaluation: An Educational Experience the Example of Norway* (Politihøgskolen 2020) 33.

[17] Following the Italian-French row over the arrival of Tunisian migrants at the start of the Arab Spring, see JJ Rijpma, 'It's my Party and I'll Cry if I Want to – "Celebrating" Thirty Years of Schengen' in B Steunenberg, W Voermans and S Van den Bogaert (eds), *Fit for the Future? Reflections from Leiden on the Functioning of the EU* (Eleven Publishing 2016) 164.

[18] Regulation (EU) 1053/2013 of the Council of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen.

[19] Report COM(2020) 779 final from the Commission of 25 November 2020 on the Functioning of the Schengen Evaluation and Monitoring Mechanism pursuant to art. 22 of Council Regulation (EU) 1053/2013; M Wagner, C Katsiaficas, J Liebl, L Hadj Abdou, L Dražanová and J Jeandesboz, *The state of play of Schengen governance: An assessment of the Schengen evaluation and monitoring mechanism in its first multiannual programme* (European Union 2020); Communication COM(2021) 277 final from the Commission of 2 June 2021 "A strategy towards a fully functioning and resilient Schengen area".

[20] Regulation (EU) 2022/922 of the Council of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, and repealing Regulation (EU) No 1053/2013, recital 23.

23. It is important to note that this new regime only applies to Member States whose evaluation has not yet been finalized.[21]

When a Schengen Candidate Country declares its readiness to be evaluated, the Commission organizes a first-time visit. The evaluation report analyses the qualitative, quantitative, operational, administrative, and organisational aspects and lists the deficiencies, areas of improvement and best practices. The report is adopted as a Commission implementing act and accompanied by draft recommendations for remedial actions.[22] Within four months of concluding the evaluation, the Commission sends a proposal for recommendations to the Council. Based on the Council recommendations, the Schengen Candidate Country submits an action plan for approval to the Commission. Once the Commission has reviewed the action plan, the Schengen Candidate Country State shall report back to the Commission and Council on its implementation on a six-monthly basis.

If the outcome of the first-time evaluation was that the accession Member State did not fulfil the conditions for the full application of the Schengen *acquis*, the Commission will organize one or more revisits, during which it will evaluate the implementation of the Council recommendations. The revisit report is also adopted as a Commission implementing act, and the Commission may propose further recommendations for adoption by the Council.[23] The action plan may be closed, following the positive outcome of a verification visit, based on a Council implementing decision on the basis of a Commission proposal.[24]

The SEMM Regulation calls for synergies with other monitoring mechanisms, such as those carried out by independent national monitoring bodies.[25] A mechanism that is expressly mentioned is the Vulnerability Assessment Mechanism (VAM), set up under the European Border and Coast Guard Regulation. Under this mechanism, Frontex assesses the preparedness of Member States in the narrower field of external border management. However, it remains unclear how exactly the interaction of the two mechanisms should take shape within the context of first-time evaluations and Schengen accession

[21] Art. 1(2)(b) of Regulation 2022/922 cit. Hence only in relation to Cyprus. Romania and Bulgaria were declared ready by the Council in 2011: Council conclusions 9166/4/11 REV 4 of 24 June 2011 on completion of the process of evaluation of the state of preparedness of Romania to implement all provisions of the Schengen acquis; Council Conclusions 9167/4/11 REV 4 of 24 June 2011 on completion of the process of evaluation of the state of preparedness of Bulgaria to implement all provisions of the Schengen acquis. Croatia's evaluation was covered by the SEMM Regulation of 2013 and was declared ready in 2021: Council conclusions 14883/21 of 9 December 2021 on the fulfilment of the necessary conditions for the full application of the Schengen acquis in Croatia.

[22] Art. 20(4) of Regulation 2022/922 cit.

[23] *Ibid*. art. 23(4).

[24] *Ibid*. art. 23(5).

[25] *Ibid*. art. 10(1).

more generally.[26] The SEMM Regulation merely states that the recommendations under the VAM will be complementary to those under the SEMM.[27]

It is important to stress that the decision on the full application of the Schengen *acquis* is a separate one from the finding that a Schengen Candidate Country fulfils all conditions under the SEMM, let alone a positive outcome of a VAM by Frontex. Fully fledged membership of a Schengen Candidate Country remains subject to a separate, unanimous Council Decision. In fact, Romania and Bulgaria were considered to have fulfilled the conditions for full accession already in 2011, yet remain outside the Schengen area till this very day. In 2022, upon their invitation, the Commission organized a complementary fact-finding mission.[28] Although EU law does not stand in the way of such additional evaluations, it does also not prescribe it in any way. It should therefore be seen as a means of exercising political pressure on blocking Member States. Once admitted, the SEMM Regulation does prescribe that a first "normal" Schengen evaluation shall be carried out in the Member State concerned within a year.[29]

III. Application of the Schengen *acquis* in Schengen candidate states

III.1. Binding but not applicable

As was pointed out above, prior to the Council's decision on full-fledged membership of the Schengen area, the provisions of the Schengen *acquis*, measures building on that *acquis* and "Schengen related measures" are *binding* upon the Schengen Candidate Country in their entirety, but only those provisions listed in Annex II of the respective Acts of Accession are *applicable* from the moment of entry into the EU.[30]

The European Border and Coast Guard Regulation, the Schengen Borders Code (SBC) and the Visa Code form the core of the regulatory framework for the management of the EU's external borders.[31] The European Border and Coast Guard Regulation applies in full from the moment of accession and Schengen Candidate Countries participate fully in the Agency's

[26] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard, art. 32(7).

[27] Art. 10(2) of Regulation 2022/922 cit.

[28] Report n. 15072/22 of the Council of 23 November 2022 of the complementary voluntary fact-finding mission to Romania and Bulgaria on the application of the Schengen acquis and its developments since 2011.

[29] Art. 23(6) of Regulation 2022/922 cit.

[30] Art. 3(1) and (2) of the Act of Accession (2003) cit.; arts 4(1) and (2) of the Act of Accession (2005), arts 4(1) and (2) of the Act of Accession 2011 cit.

[31] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624; Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code); Regulation (EC) n. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

activities and are full members of the Management Board. The SBC applies with the exception of those provisions directly linked to the lifting of internal border controls. These are art. 1(1), providing for the absence of controls at the internal borders, art. 6(5)(a), allowing entry for transit of a third country national who does not fulfil the entry conditions of art. 6(1), but holds a residence permit or long-term stay visa from another Member State, Title III on the absence of internal border controls and their temporary reinstatement, and the provisions of Title II and the annexes thereto referring to the SIS[32] and the Visa Information System (VIS).[33] The Visa Code does not apply, and hence, the Schengen Candidate Countries can only issue national visas, which are not valid for entry into the Schengen area.[34]

Although it may appear straightforward which provisions do (those listed in Annex II) and which do not (anything not listed in Annex II) apply, it is in fact less so due to the continuous development of the Schengen *acquis* and the undefined notion of "Schengen related measures". For instance, some would qualify the Dublin Regulation on the allocation of responsibility for asylum requests as a Schengen-related measure, as after all these rules originate in the CISA.[35] Yet, the Dublin Regulation is not listed in Annex II, even though it applies in full in the Schengen Candidate Countries.

III.2. Defining Schengen's external borders

Additional legal uncertainty arises from the definition of internal and external borders under the SBC. This definition is central to the application of the SBC itself, as well other parts of the Schengen *acquis* and the broader EU migration and asylum rules. The SBC distinguishes between Schengen Candidate Countries and "Schengen States fully applying the Schengen acquis" or "the area without internal border controls". However, for the purpose of external border controls (Title II SBC), Schengen Candidate Countries are considered "Schengen States".[36]

[32] Art. 6(1)(d) on entry conditions for third country nationals; arts 8(2)(a)(1), 8(3)(a)(i)(1) and (vi) on the verification of identity, nationality, objects and vehicles in SIS upon entry and arts 8(3)(g)(i)(1) and 8(3)(h)(iii) on the same checks upon exit of Regulation 2016/399 cit.

[33] Arts 8(3)(b), 8(3)(h) and 8(3)(i) on the verification of identity and visa by consulting the VIS upon entry and exit of Regulation 2016/399 cit.

[34] Recital 38 of Regulation 810/2009 cit. See also the Annex C(2022) 7591 final of 28 October 2022 to the Commission Recommendation establishing a common "Practical Handbook for Border Guards" to be used by Member States' authorities when carrying out the border control of persons, 7.

[35] Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

[36] Annex C(2022) 7591 final cit. 5. See, however, the contrary opinion of the Council Legal Service on the territorial scope of application of the Entry Exit System in the light of Article 6(1) of the Schengen Borders Code for the purpose of calculating the short-stay (90 days in any 180-day period), Council Document 13491/16, in particular 9.

Art. 2(2) SBC defines the term external borders as the Member States' land borders and ports, "provided that they are not internal borders". Internal borders, in turn, are defined as the common land borders of the Member States, as well as their (air)ports serving intra-Schengen destinations. Since this *Article* applies to Schengen Candidate Countries, their borders with non-Member States must be considered external borders for the purpose of the SBC, and hence, they must manage these borders based on the SBC, to the extent that it applies under the respective Acts of Accession.[37] Still, the evaluation of whether a third country national fulfils the SBC's entry requirements, for instance, as regards the length of stay, the purpose of stay and means of subsistence, are to be made in relation to the Schengen Candidate Countries' territory alone.[38]

The definition of Schengen Candidate Countries' borders with third countries as external borders has been confirmed by the Court of Justice of the European Union (CJEU) in case law relating to the application of the Dublin Regulation. In *Jafari*[39] and *A.S.*,[40] the CJEU was asked to interpret the criteria for allocating responsibility for an asylum request, following the practice of Croatia at the height of the European refugee policy crisis to "waive through" asylum seekers, allowing them to travel onward to other Member States. The Court had to decide whether this policy of acquiescence amounted to the deliverance of a visa under art. 12 of the Dublin Regulation, or alternatively, whether the entry of the asylum seekers could be considered as an irregular border crossing in the sense of art. 13 of the Dublin Regulation. In either case, Croatia would be responsible for processing the request.

The Court ruled that Croatia, at the time still a Schengen Candidate Country, had not issued a visa, as this would have required a formally adopted act by national authorities.[41] The Court clarified that even though the Visa Code was not yet applicable in Croatia, and the country hence did not issue Schengen visas, its national short-stay or transit visas, nonetheless, had to be regarded as visas for the purpose of the Dublin Regulation.[42] The Court then turned to the interpretation of "irregular crossing" in art. 13 of the Dublin regulation.

In the absence of a definition in the Dublin Regulation itself, the Court ruled that the concept implies entry into a Member State without fulfilling the conditions of art. 6(1) SBC.[43] Unlike Advocate-General Sharpston,[44] who had emphasized the standalone nature of the Dublin Regulation, the Court considered the Dublin Regulation to form part of a broader framework of secondary legislation, which included the provisions on entry of

[37] See also, Council Legal Service cit. 5.
[38] Annex C(2022) 7591 final cit. 6.
[39] Case C-646/16 *Jafari* ECLI:EU:C:2017:586.
[40] Case C-490/16 *A.S.* ECLI:EU:C:2017:585.
[41] *Jafari* cit. paras 48 and 58; *A.S.* cit. para. 37.
[42] *Jafari* cit. para. 45.
[43] *Ibid*. paras 74-75.
[44] Case C-490/16 *A.S.* ECLI:EU:C:2017:443, opinion of AG Sharpston and case C-646/16 *Jafari* ECLI:EU:C:2017:443 , opinion of AG Sharpston, paras 121-141.

the SBC.[45] In doing so, the CJEU accepted the applicability of the SBC at Croatia's external borders with third countries.[46] Since the asylum applicants had passed the border, not complying with the entry conditions of the SBC, Croatia became the responsible Member State under the Dublin Regulation.[47] Importantly, the Court stated that this responsibility was guided by the spirit of solidarity and common effort with whom Member States, including Schengen Candidate Country Croatia, guard the external EU borders.[48]

III.3. The legal regime at the Schengen states' border with Schengen candidate countries

Although we have established that the borders of Schengen Candidate Countries with third countries must be defined as external borders, that does not yet resolve the question of the applicable legal regime at the borders between Schengen Member States and Schengen Candidate Countries.

In an infringement procedure initiated in 2018 by Slovenia against Croatia, against the background of a Slovenian-Croatian border dispute, Slovenia argued that the border in question remained "an external border to which the provisions of the Schengen Borders Code that relate to external borders apply".[49] The CJEU eventually declared it lacked jurisdiction to evaluate the alleged infringements of the SBC.[50] In 2015, the Commission stated that EU law did not explicitly prohibit the construction of border fences between Schengen Member States and Croatia "at what in the meantime is still an external Schengen border".[51] At the same time, Frontex, the European Border and Coast Guard Agency, whose mandate in joint operations is limited to the external borders of the Member States as defined in the SBC, has at no point organized joint operations at the borders between Schengen Member States and Schengen Candidate Countries.

It is clear that the SBC itself does not provide a specific regulatory framework for the crossing and management of these borders. The SBC only distinguishes between internal and external borders, which are defined by reference to each other and must be considered mutually exclusive.[52] Staying without the system of the SBC, we would argue that the borders between Schengen Member States and Schengen Candidate Countries must be considered internal borders, more specifically internal borders at which controls have not yet been lifted. Therefore, the management of these borders remains governed by

[45] *Jafari* cit. paras 73-75.
[46] *Ibid*. para. 45.
[47] *Ibid*. para. 92.
[48] *Ibid*. para. 85.
[49] Case C-457/18 *Slovenia v Croatia* ECLI:EU:C:2020:65 para. 99.
[50] *Ibid*. para. 108.
[51] Communication COM(2015) 675 final from the Commission of 15 December 2015 on the Eighth biannual report on the functioning of the Schengen of 1 May to 10 December 2015 area, 4.
[52] See also case C-444/17 *Arib* ECLI:EU:C:2019:220 para. 62.

national law and not EU law. Any other interpretation would mean that the rules on the reinstatement of internal border controls in the SBC, under which controls at the internal borders may only take place in exceptional circumstances and for a limited duration, would have to apply to these border controls.

Our reading is supported by the fact that controls at these borders have indeed taken place on the basis of national law, which however prescribes the analogous application of the provisions on external border control in Title II of the SBC.[53] As such, the only apparent difference between the border regime at either set of borders is the use of the "one-stop" border check principle, entailing border controls at only one side of the border between Schengen Candidate Countries and Schengen members. One could therefore argue that, substantively, there are two layers of external borders.[54] Even if legally speaking the border between Schengen Candidate Countries and Schengen members is not an external border within the meaning of the SBC, in practice it is guarded as such, representing a *de facto* second external border.

The CJEU would have jurisdiction to answer preliminary questions on the analogous application of the SBC at the internal borders where border controls have not yet been lifted,[55] but the Commission and Court would not have the competence to enforce the Schengen rules on border control, including compliance with EU fundamental rights, if the legal basis is purely national law. The only way such national border management measures would fall within the scope of EU law is if they were to violate rules of EU law that do apply at these borders, such as the EU's asylum *acquis*.

The definition of the border between Schengen Candidate Countries and Schengen members also has implications for the application of other measures of the Schengen *acquis*. At this point, it may prove useful to refer to the Court's case law on the application of the Return Directive[56] at internal borders in situations of reintroduced border controls based on art. 25 SBC. In *Affum*[57] and *Arib*,[58] third-country nationals who had irregularly entered France

[53] See *e.g*. the Croatian Aliens Act as amended by NN 130/11, 74/13, 69/17 and 46/18, arts 34-39; Foreigners in the Republic of Bulgaria Act n. 153/23.12.1998 as amended by 53/27.06.2014, ch. 2; Romanian Aliens Act as amended by Law No. 157/2011, ch. II, Section I, arts 6-10.

[54] Our argument is further supported by the Council's General Approach on the Proposal for a Screening Regulation COM(2020) 612 final of 23 September 2020 introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, which would add a recital 18(c) stating that at those borders the proposed rules for screening within the territory and not the rules established for screening at the external borders, Council Document 10585/22.

[55] In line with its consistent case law, under which it is willing to assume jurisdiction for preliminary questions relating to provisions of national law that refer to provisions of EU law: joined cases C-297/88 C-197/89 *Dzodzi* ECLI:EU:C:1990:360 para. 36.

[56] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter: Return Directive).

[57] Case C-47/15 *Affum* ECLI:EU:C:2016:408.

[58] *Arib* cit.

from another Schengen country after internal border controls had been reinstated at the French border were subjected to an accelerated national return procedure. Under art. 2(2)(a) of the Return Directive, Member States may derogate from several safeguards in the Return Directive, such as the issuing of a formal return decision or a period of voluntary departure, in case a third country national is subject to a refusal of entry or apprehended in connection with an irregular crossing of the external border. Given that controls at the internal borders had been reinstated, the French authorities argued that this *Article* applied by analogy.

The CJEU ruled differently.[59] Although art. 32 SBC provides that where internal border controls have been reintroduced, relevant provisions of Title II SBC apply *mutatis mutandis*, this does not equate these borders to external borders under the provisions of the Return Directive.[60] First, art. 2(2)(a) exclusively refers to a crossing of external borders without mentioning internal borders or the reinstatement of internal border checks.[61] Second, a teleological interpretation of the provision excludes its application to internal border crossings, as the provision aims to allow Member States to take advantage of the vicinity of the external EU border to speed up return.[62] Third, the Court confirmed that a systematic reading of art. 2 SBC implies that internal and external borders are mutually exclusive.[63] Moreover, art. 32 SBC provides that only relevant provisions of the SBC relating to external borders apply *mutatis mutandis*, which must be read to exclude provisions of other EU secondary legislation, such as the Return Directive, which is even explicitly distinguished from the SBC in art. 13(1) SBC.[64]

The Court reaffirmed its understanding of the scope of art. 2(2)(a) in *Affum* and *Arib* as exclusively applicable at external borders in a more recent case on reintroduced French border controls, further clarifying the interaction between the SBC and the Return Directive.[65] Although art.14 SBC, which obliges Member States to impose a refusal of entry to third country nationals apprehended or intercepted in connection with the irregular crossing of an external border, may be applied *mutatis mutandis* at reintroduced internal borders, this does not widen Member States' margin to invoke the exception of applying the Return Directive under art. 2(2)(a) at internal borders.[66]

We would argue that at the internal borders at which controls have not yet been lifted, the same reasoning as in *Affum*, *Arib* and *ADDE* should apply, namely that these borders should not be considered external borders for the application of the Return Directive. As a consequence, this would mean that the accelerated return procedures by

[59] *Affum* cit. para. 69; *Arib* cit. paras 69 and 77.
[60] *Arib* cit. paras 49-50.
[61] *Ibid*. para. 51.
[62] *Affum* cit. para. 74; *Arib* cit. paras 55-56.
[63] *Arib* cit. para. 62.
[64] *Ibid*. paras 64-65.
[65] Case C-143/22 *ADDE* ECLI:EU:C:2023:689.
[66] *Ibid*. paras 35-40.

Hungary and Slovenia, which were reported at the Croatian border fence in the run-up to Croatia's full accession, were contrary to art. 2(2)(a) Return Directive.[67] For the purpose of the application of art.14 SBC, the situation may be more nuanced, requiring an examination of whether the person in question should be considered legally present in the Schengen Candidate Country from which she attempts to enter. However, if this is not the case a similar reasoning as proposed by Advocate General Rantos could be applied.[68]

IV. Participation without full membership

A final development that deserves attention is the progressive application of parts of the Schengen *acquis* by Schengen Candidate Countries which under the respective Acts of Accession were to become applicable only upon full accession. Paradoxically, by applying more and more of the Schengen *acquis*, Schengen Candidate Countries increasingly participate as full Schengen countries without having obtained full membership.

The EU legislator, in the recitals to AFSJ legislation, stipulates whether the measure in question constitutes a Schengen developing measure, and if so, whether the measure applies or not, pending a Council decision on full accession. In two cases, *UK v Council (Frontex)* and *UK v Council (Passports)*, the Court has interpreted Schengen developing measures as provisions which, "judged by their content and purpose, guarantee or improve the effectiveness of parts of the Schengen *acquis*".[69] In these cases the CJEU upheld the Council's decision to exclude the UK from opting into Regulation 2007/2004 establishing Frontex and Regulation 2252/2004 on security standards for passports and travel documents.[70] Arts 4 and 5 of the Schengen Protocol enabled the UK and Ireland to opt into parts of the Schengen *acquis*, including Schengen developing measures, subject to a unanimous Council Decision. Importantly, the CJEU clarified that the UK could not participate in Schengen developing measures as long as the underlying parts of the Schengen *acquis*, notably, lifting the internal borders, had not been adopted.[71]

The Court confirmed its ruling in a subsequent case on Decision 2008/633/JHA, providing access to the VIS for law enforcement staff.[72] Despite the argument that this measure

[67] European Commission, 'The Effectiveness of Return in EU Member States: Synthesis Report for the EMN Focused Study' (Synthesis Report for the EMN Focussed Study-2018) 17; UNCHR, *Hungary as a Country of Asylum* www.refworld.org p. 20.

[68] Case C-143/22 *ADDE* ECLI:EU:C.2023:271, opinion of AG Rantos.

[69] Case C-77/05 *UK v Council (Frontex)* ECLI:EU:C:2007:803 para. 85; case C-137/05 *UK v Council (Passports)* ECLI:EU:C:2007:805 para. 65.

[70] Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operation Cooperation at the External Borders of the Member States of the European Union; Council Regulation (EC) 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States.

[71] *UK v Council (Frontex)* cit. paras 61-63; *UK v Council (Passports)* cit. para. 50.

[72] Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the

should be seen as an independent measure falling within the field of police cooperation, the Court held that it was intimately linked to the VIS itself, which constitutes Schengen developing measure in which the UK could not participate without accepting the underlying *acquis*. The Court did not block the cooperation arrangements with the UK provided for under the European Border Surveillance System (EUROSUR) Regulation, stating that the establishment of limited forms of cooperation within the framework of Schengen developing measures would still be allowed.[73] However, the message of the Court has been a clear rejection of the possibility to pick and choose from the Schengen *acquis* and its developing measures.[74] As such, the Court has done justice to the ancillary nature of flanking measures, whose primary aim is to allow for the lifting of internal borders, rather than to constitute measures for the control of migration or law enforcement in their own right.

Whilst logic would dictate that Schengen measures developing parts of the *acquis* that have been excluded from full application in the Schengen Accession Countries, would automatically be inapplicable in Schengen Accession Countries, a range of Schengen developing measures have been rendered applicable in the course of the accession process of Romania and Bulgaria, and to a lesser extent that of Croatia and Cyprus.

Although not applying the Visa Code, Council Regulation 539/2001, listing third countries whose nationals must be in possession of visas when crossing the external borders, has been listed in Annex II of the respective Acts of Accession and has thus been applicable from the moment of accession to the EU.[75] Moreover, Schengen Candidate Countries have been allowed to unilaterally recognize certain documents issued by other Member States, including those regulated by the Visa Code, as equivalent to their national visa for transit through or intended short-stay on their territory.[76] This includes visas and residence permits issued by other Schengen Candidate Countries.[77]

prevention, detection and investigation of terrorist offences and of other serious criminal offences; case C-482/08 *UK v Council (VIS)* ECLI:EU:C:2010:631 para. 61.

[73] Case C-44/14 *Spain v European Parliament and Council (Eurosur)* ECLI:EU:C:2015:554 para. 42.

[74] *Ibid*. paras 48 and 58; cfr the submission of the Commission in *UK v Council (Frontex)* cit. para. 50; see also J Rijpma, 'Case Note Case C-77/05 and Case C-137/05' (2008) CMLRev 835.

[75] Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

[76] Decision 565/2014/EU of the European Parliament and the Council of 15 May 2014 introducing a simplified regime for the control of persons at the external borders based on the unilateral recognition by Bulgaria, Croatia, Cyprus and Romania of certain documents as equivalent to their national visas for transit through or intended stays on their territories not exceeding 90 days in any 180-day period and repealing Decisions No 895/2006/EC and No 582/2008/EC. The Council Legal Service went as far as to conclude that for the purpose of calculation of length of stay under art. 6 SBC, a difference in treatment between Schengen Member States and the Schengen Accession Countries Bulgaria, Croatia, Cyprus and Romania could not be objectively justified, let alone required; Council Document 13491/16 cit. 10.

[77] As confirmed by the Court in case C-584/18 *D. Z. v Blue Air* ECLI:EU:C:2020:324 para. 60.

Schengen Candidate Countries have also progressively gained access to the EU's large-scale information systems, the SIS and the VIS. Romania and Bulgaria have had the possibility to enter data in the SIS and use these data since 2010, Croatia since 2017 and Cyprus since 2023.[78] The only restriction remaining is that pending the lifting of internal border controls, Schengen Candidate Countries cannot make an entry for refusal of entry under art. 96 CISA, and are not obliged to refuse entry based on such an entry made by Schengen Member States.

The Council justified the partial access of Romania and Bulgaria to the SIS, under the 2010 Decision, with the need to verify the correct application of SIS provisions as a part of the Schengen evaluation procedure, which amounts to a somewhat circular reasoning.[79] It emphasized that no full SIS access would be given until the Council would have decided on the full application of the Schengen *acquis*.[80] However, in 2018, it lifted the remaining restrictions regarding entries for refusal of entry, with reference to the positive evaluation of Bulgaria and Romania's readiness to join Schengen in 2011.[81] The Council also stressed the need to strengthen these Member States' external borders, contributing to the overall security level of the Schengen Area.[82]

Romania and Bulgaria were granted passive access to the VIS, based on a Council Decision of 2017, which came into effect in 2021, following a technical evaluation procedure by the EU agency for large-scale information systems.[83] Council Decision 2017/1908 allows them to draw intelligence from the VIS in order to examine short-stay visa applications without the active use of the data system, *i.e*. entering, deleting or amending data.[84] The EU legislator considered it appropriate to award Romania and Bulgaria this access to the VIS in order to improve their external border management and to increase the level of security in the Schengen Area.[85] Importantly, following the reform of the VIS Regulation, law enforcement authorities of all Schengen Candidate Countries will have access to the VIS.[86]

[78] Council Decision 2010/365/EU of 29 June 2010 on the application of the provisions of the Schengen acquis relating to the SIS in Bulgaria and Romania; Council Decision (EU) 2017/733 of 25 April 2017 on the application of the provisions of the Schengen acquis relating to the Schengen Information System in the Republic of Croatia; Council Decision (EU) 2023/870 of 25 April 2023 on the application of the provisions of the Schengen acquis relating to the Schengen Information System in the Republic of Cyprus.

[79] Recitals 2 and 4 of Council Decision 2010/365/EU cit.

[80] *Ibid*. Recital 5; see also Recital 7 of Council Decision 2017/733 cit. and Council Decision 2023/870 cit.

[81] Council Decision (EU) 2018/934 of 25 June 2018 on the putting into effect of the remaining provisions of the Schengen acquis relating the SIS in Bulgaria and Romania.

[82] *Ibid*. Recitals 3 and 5.

[83] Art. 1(1) of Council Decision (EU) 2017/1908 of 12 October 2017 on putting into effect of certain provisions of the Schengen acquis relating to the VIS in Bulgaria and Romania.

[84] *Ibid*. art. 2.

[85] *Ibid*. Recital 4.

[86] Regulation (EU) 2021/1134 of the European Parliament and the Council of 7 July 2021 amending the Visa Code, art. 22(t). Note the difference with the earlier exclusion of the UK from law enforcement access.

The EU legislator has steadily expanded the number and functions of large-scale information systems in the Area of Freedom, Security and Justice, with the establishment of a European Criminal Records Information System for TCNs (ECRIS-TCN),[87] an Entry/Exit-System (EES) recording all movements across the external borders, and a European Travel Information and Authorisation System for TCNs exempt from the requirement to be in possession of a visa when crossing the external borders (ETIAS-TCN).[88] Moreover, it has adopted legislation making these systems interoperable.[89]

The difficulty is that the functioning of both the EES and ETIAS presupposes (passive) access to the VIS and SIS. Moreover, the EES and ETIAS amend the conditions for entry and exit under art. 6 SBC, which have applied to the Schengen Accession Countries from the moment of accession, and the way in which checks are to be carried out. The Commission's proposal on ETIAS-TCN still stated that in so far as it amended art. 6 SBC, it constituted a developing measure that would be immediately applicable in the Schengen Accession Countries.[90] However, this would presuppose the operability of the system in those countries. It does not surprise, therefore, that the EES Regulation and the Regulation on the conditions for access to the ETIAS thus explicitly state that they constitute Schengen developing measures that do not apply until the lifting of internal border controls.[91] This non-applicability is, however, qualified by the Council decisions granting (limited) access to the VIS and SIS to Schengen Candidate Countries.[92] As such, ETIAS-TCN and the EES will become applicable in the Schengen Candidate Countries that have passive access to the VIS and are fully implementing the SIS, namely Bulgaria and Romania.

[87] Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing ECRIS-TCN to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726.

[88] Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226.

[89] Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders; Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration.

[90] Proposal COM(2019) 4 final of 7 January 2019 for a Regulation of the European Parliament and the Council establishing the conditions for accessing other EU information systems for ETIAS purposes and amending Regulation (EU) 2018/1240, Regulation (EC) No 767/2008, Regulation (EU) 2017/2226 and Regulation (EU) 2018/1861. See also, Council Document 13491/16 cit.

[91] Regulation (EU) 2021/1152 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861 and (EU) 2019/817 as regards the establishment of the conditions for accessing other EU information systems for the purposes of the European Travel Information and Authorisation System, recital 20; recital 57 Regulation 2018/1240 cit.

[92] Recital 57 of Regulation (EU) 2018/1240 cit.

Given the extensive application of Schengen *acquis* by Schengen Candidate States, we may safely conclude that the current Schengen Member States are "having their cake and eating it". While keeping Romania and Bulgaria out of the Schengen area, they participate as near full members in the EU's migration control and security architecture, guarding a *de facto* two-layer external border. In the end, the broader the application of the Schengen *acquis* by Schengen Candidate Countries in practice, the smaller the incentive becomes for current Schengen members to allow them to join the free travel area. Of course, the main difference with the situation of the UK previously, is that the Schengen Candidate Countries do fully subscribe to the objective of a lifting of internal border controls and continue to express their desire to become full members.

Based on the logic that if the Council is allowed to decide on the full application of the Schengen *acquis*, it would also not seem problematic for the Council to allow for greater participation incrementally.[93] One may even understand the, admittedly circular, reasoning that in order to verify Schengen Candidate Countries' readiness to apply these measures, they would need to first apply them. Even if contrary to the wording of the Acts of Accession, it is reminiscent of the declaration to art. 139 CISA, which required that Member States fully apply the flanking measures, before controls at the internal borders may be lifted.

At the same time, there is a blatant inconsistency to block full participation of Romania and Bulgaria, based on concerns relating to corruption, organized crime and the rule of law, whilst granting these countries access to instruments of information storage and exchange which contain vast amounts of personal data and operate based on mutual trust. More importantly, the application of these Schengen developing measures runs counter to their rationale as "flanking" or "compensatory" measures, there to enable the lifting of border controls. It, unjustifiably, deprives the citizens of Schengen Candidate Countries of the benefits of free travel, which should be read in the light of the fundamental freedom of movement of EU citizens under the Treaties, as well as the right to free movement under art. 45 of the Charter on Fundamental Rights.[94]

V. Conclusion

This *Article* has shown the complexity and legal uncertainty resulting from the bifurcated accession to Schengen calling for an overhaul of the current process.

As in many fields subject to unanimity, any single Member State may bring the integration process to a grinding halt. A future Treaty revision should therefore amend the Schengen Protocol, allowing for qualified majority voting, preferably based on a proposal

[93] Cfr. case 25/70 *Köster* ECLI:EU:C:1970:115 para. 9.

[94] See case C-368/20 *N.W.* ECLI:EU:C:2022:298 para. 64 and case C-817/19 *Ligue des Droits Humains* ECLI:EU:C:2022:491 paras 274-277. See also, JJ Rijpma and S Salomon, 'The Promise of Free Movement in the Schengen Area: The Decision of the Court of Justice in Landespolizeidirektion Steiermark (N.W.)' (2023) ELR 123.

by the Commission and with the consent of Parliament. Alternatively, future accession treaties could provide for such procedure in relation to Schengen accession of the new Member State.[95]

Future acts of accession should in any case clarify the relation between a finding of readiness under the SEMM and the Council decision on full application of the Schengen *acquis*. They should provide for clear obligations, establishing in unequivocal terms the conditions that need to be fulfilled for a decision on full accession to the Schengen area, in addition to those of the first-time evaluations under the SEMM, and preferably provide for a binding timeline.

In addition, future acts of accession should clarify the meaning of Schengen-related measures for the purpose of Schengen accession, and how their application is to be evaluated and weighed in the accession process. They should also specify to what extent Schengen developing measures may be applied as self-standing security measures, in the absence of free travel. Finally, they should define the status of the borders of the Schengen Accession Countries both with third countries and with existing Schengen members pending a decision on the lifting of internal border controls. A transitional border regime, firmly rooted in EU law, should be included in the SBC, removing any doubt as to the applicability of EU standards for border management at these borders, including the Charter of Fundamental Rights.

Much more than in any other fields of EU cooperation, mutual trust is essential to the Schengen cooperation, underpinning the Area of Freedom, Security and Justice as a whole. There is therefore merit in the argument that the readiness for Schengen accession should not be judged merely based on technical criteria, but take into account other factors with a bearing on Schengen cooperation, such as respect for the rule of law. This was first acknowledged, albeit in very general terms, in the Act of Accession of Croatia, which linked the decision on full application of the Schengen *acquis* with the country's wider commitments in the field of fundamental rights. The reformed SEMM now pays horizontal attention to the respect for fundamental rights. However, as regards Bulgaria and Romania, Schengen states have changed the rules of the game as it was being played, amongst other by linking Schengen accession to their performance under the CVM. From the very perspective of the rule of law itself this is equally problematic, even more so when the arguments against answer more to national political agenda's than to concerns in relation to the Schengen Candidate countries themselves.

Free travel, unhindered by internal border controls, is one of the EU's main achievements. It is both a Treaty objective and part and parcel of the rights connected to EU citizenship. Currently, the EU has a *de facto* double layer of external borders, and a security infrastructure, which was initially set up to enable free movement, but, in relation to the Schengen Accession Countries, serves first and foremost the objectives of migration

[95] Although the compatibility of such provision with primary law could be questioned under art. 218(11) TFEU.

control and law enforcement. Nationals of Romania, Bulgaria and Cyprus remain excluded from fully enjoying the benefits of their EU citizenship, whilst the semi-permanent exclusion of Romania and Bulgaria sits uneasily with the idea of equality of Member States, laid down in art. 4(2) of the Treaty on European Union (TEU). As the Commission has pointed out in its most recent State of Schengen report, not lifting internal borders has negative economic and environmental consequences not just for Bulgaria and Romania but the EU as a whole.[96] Their continued exclusion must be deemed both legally and politically untenable and similar situations should be avoided in future accessions.

[96] Communication COM(2023) 274 final from the Commission of 16 May 2023 on the State of Schengen report 2023.